Supreme Court, U.S.
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No. 98-1264

In The

Supreme Court of the United States

October Term, 1998

MARK J. FOURNIER,

Petitioner,

v.

CHARLES REARDON, Individually and in his capacity as Sheriff for the County of Essex, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court Of Appeals For The First Circuit's decision that the allegations of the petitioner's Complaint failed to state a claim under 42 U.S.C. § 1983 for which relief can be granted so far departed from the accepted and usual course of proceedings as to call for an exercise of the Court's supervisory power.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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ARGUMENT IN OPPOSITION TO THE PETITION

The Petition Does Not Demonstrate That The Court Of Appeals Decision And Order So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of The Court's Supervisory Power.

The petitioner asserts, in support of his claim to further appellate review, that the Court of Appeals decision and Order dismissing his Complaint, for failure to state a claim for which relief can be granted under 42 U.S.C. § 1983, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power. Contrary to the petitioner's claim, examination of the subject decision discloses that the Court of Appeals decision and Order was consistent with the usual course of judicial proceedings and that further review is unnecessary. Furthermore, the challenged decision is of no transcendent significance to the operation of our federal system which might providently call for expenditure of the Court's limited resources, but is significant only to the present parties. Accordingly, the Court should deny the petition.

A. The Court Of Appeals Decision Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings.

The Court of Appeals decision manifests sound legal reasoning and a reliance on applicable law, both of which supported dismissal of the petitioner's claim. In holding that the allegations of the Complaint did not plead that an unconstitutional unreasonable "seizure" of the

petitioner by the respondents occurred, the court declined to persist in the fiction that an alleged instance of hazing which was incidental to the petitioner's training at a correctional officers' training academy was an unconstitutional "seizure." Stated another way, the Court of Appeals was unwilling to consider the respondents' alleged conduct an unconstitutional "seizure" where the Complaint did not allege that the petitioner was not free to leave and where "all of the circumstances surrounding the incident" were not such that "a reasonable person [in the petitioner's place] would have believed that he was not free to leave."

The petitioner's argument in support of his petition, and his argument before the Court of Appeals, depend on the errant presumption that the allegations of his Complaint, bolstered by the reasonable favorable inferences afforded to parties opposing a motion to dismiss, mandate the conclusion that the petitioner was subjected to an unconstitutional seizure. The petitioner's argument failed before the Court of Appeals, and must fail on his Petition For Writ Of Certiorari, because the inferences procedurally afforded him in his defense of the motion to dismiss do not include all conceivable inferences, but are limited to *reasonable* inferences. The petitioner is not procedurally entitled to benefit from "purely conclusory allegations, indulge in rank speculation, or draw improbable inferences" to defeat a motion to dismiss. *See National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir.), *cert. denied* 515 U.S. 1103, 115 S.Ct. 2247 (1995). In finding that a "reasonable observer . . . would not believe that Fournier was not free to call an end to the 'house arrest,' " the Court of Appeals decided that the inference

upon which the continuing viability of the petitioner's claim depended was not a reasonable inference, and that the allegations of the Complaint fell short of pleading the deprivation of the petitioner's federal civil rights necessary to support recovery under 42 U.S.C. § 1983.

The Court of Appeals was correct in deciding that the Complaint does not allege, nor does it support the reasonable inference that the respondents effected an unconstitutional unreasonable seizure of the petitioner. "[A] person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980). In each instance in the Complaint where the event which gives rise to the petitioner's claim is described as "House Arrest," the petitioner placed the term "House Arrest" in quotation marks, presumably to acknowledge that the procedure described by the petitioner was something other than an actual arrest. The Complaint alleges that the petitioner attended the basic training course as "a prerequisite to the petitioner continuing in his permanent, full time employment as a corrections officer." The Court of Appeals was aware that the petitioner had been a corrections officer for over ten (10) years before he entered the academy because this fact was argued in the petitioner's brief to the Court of Appeals. The Complaint alleges that the petitioner was informed at the time of the alleged seizure that he was being treated in that manner "for entering the staff office without first requesting permission," and that the petitioner was ordered "back to his seat in the classroom [with the other corrections officer

recruits] and ordered . . . to redo the reports in his mouth." From these facts and others alleged in the Complaint and argued to the Court of Appeals, the Court of Appeals reasonably concluded that "a reasonable observer would conclude that Fournier was the subject of improper hazing, which might give rise to a state law claim . . . but would not believe that Fournier was not free to call an end to the "house arrest" and have the handcuffs removed."

The Complaint does not allege that the petitioner was not free to leave, though the petitioner contends that this was an inference reasonably to be drawn from the allegations of the Complaint. The Court of Appeals disagreed. Based upon "all of the circumstances surrounding the incident," the Court of Appeals declined to allow the petitioner the unreasonable inference that "a reasonable person [in the petitioner's place] would have believed that he was not free to leave." The Court of Appeals' decision was reasonable and proper, and no further appellate review is necessary.

B. The Court Of Appeals Decision Does Not Have Importance To The Operation Of Our Federal System Which Warrants Further Review By The Court.

The Court should deny the petition because the challenged decision lacks importance which extends beyond the parties to this litigation. Since the Court's ability to hear and devote attention and resources to cases having obvious and lasting significance to the operation of our

nation's federal system would be compromised by allocation of the Court's resources to cases having importance only to parties directly affected by their outcome, the Court should deny this petition.

Certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-258, 36 S.Ct. 269, 271 (1916); *see Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 531, 77 S.Ct. 459, 463 (1957) (Frankfurter, J., dissenting). Consideration of the present petition must be undertaken in view of "the volume and complexity of the cases [submitted to the Court by Petition For Writ Of Certiorari] which obviously call for decision by this Court, and . . . the time and thought that the proper disposition of such cases demands." *Rogers*, 352 U.S. at 531, 77 S.Ct. at 463. The Court's power to control its docket, bestowed by Congress at the Court's request, "carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough. *Id.* The decision in the present case holds no importance to the operation of our federal system, though the outcome of the case is obviously significant to the parties affected by the Judgment.

The Court of Appeals decision reports that court's application of a general rule of civil procedure to facts unique and specific to one instance of alleged wrongdoing between the petitioner and respondents. The decision holds no novel application of federal law which may have broad application to persons who may govern their

conduct by any rule set forth in this decision. The significance of the decision, if any, is that 42 U.S.C. § 1983 does not create substantive rights but rather provides a vehicle for the protection and vindication of rights secured by the United States Constitution or by federal law. *Baker v. McCollan*, 443 U.S. 137, 146 n.3, 99 S.Ct. 2689, 2695 n.3 (1979). This principle needs no amplification or repetition.

Since the Court of Appeals decision lacks lasting importance to the operation of the federal system, the Court's resources would be better spent on matters of lasting and substantial significance properly before the Court. Further appellate review is not necessary or warranted in the present case.

CONCLUSION

Issuance of a Writ of Certiorari and further review of the Court of Appeals decision is unnecessary and would serve no wise and useful purpose, since the Court of Appeals decision does not depart from the accepted and usual course of judicial proceedings. Notwithstanding of the petitioner's evident disappointment with the outcome of his lawsuit, the Court of Appeals acted appropriately and within its authority in deciding that the Complaint failed to state a claim for which relief can be granted. Even if the petitioner were correct in asserting that the Court of Appeals erred in construing the Complaint as it did, such an error would consist of no more than an erroneous factual finding or misapplication of the Federal

Rules of Civil Procedure, which lacks precedential significance sufficient to transcend the present case and to warrant the Court's attention.

Respectfully submitted,

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